No. 84-701

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

RIVERSIDE BAYVIEW HOMES, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE

STATE OF CALIFORNIA, JOHN K. VAN DE KAMP, ATTORNEY GENERAL OF CALIFORNIA, CALIFORNIA COASTAL COMMISSION, SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, CALIFORNIA COASTAL CONSERVANCY, AND THE STATES OF CONNECTICUT, HAWAII, ILLINOIS, LOUISIANA, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NORTH CAROLINA, RHODE ISLAND, TENNESSEE, VERMONT, WEST VIRGINIA, AND WISCONSIN

IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether the Corps of Engineers' administrative interpretation of its jurisdiction to regulate discharges into "adjacent wetlands" under the Clean Water Act of 1977 properly embraces inundated or saturated lands which support aquatic vegetation, but are not necessarily "frequently flooded" by adjacent streams, lakes, or seas.

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Amici respectfully submit this brief, pursuant to Rule 36.4 of the Rules of the United States Supreme Court, in support of petitioner, the United States of America.

INTERESTS OF AMICI

The states which have joined as amici in this brief share a deep and abiding concern for the future of wetlands within their respective jurisdictions. The historic loss of wetlands described below and the manifold threats to their existence impel amici to urge that this Court uphold the legal authority of the U.S. Army Corps of Engineers ("Corps") to effectively regulate discharge activities in wetlands.

Wetlands perform a variety of ecological functions which are of tremendous significance. They provide food and habitat for many varieties of fish, and both game and nongame animals. Office of Technology Assessment, Congress of the United States, Wetlands: Their Use and Regulation 52-60 (1984) [hereinafter "OTA, Wetlands"]. In addition to providing year-round habitat for resident bird species, wetlands are important as breeding grounds, wintering areas, and feeding sites for migratory waterfowl and other birds. Fish and Wildlife Service, U.S. Dep't of the Interior, Wetlands of the United States: Current Status and Recent Trends 14 (1984) [hereinafter "Wetlands of the U.S."]; Council on Environmental Quality, Our Nation's Wetlands 2 (1978) [hereinafter "CEQ, Our Nation's Wetlands"]. Wetlands are among the most productive ecosystems in nature, and therefore serve as an important link in the food chain. OTA, Wetlands at 57-59; CEQ, Our Nation's Wetlands at 2, 21-22; *see* J. Kusler, Our National Wetland Heritage 3 (1983).

The economic and commercial implications of these environmental values are enormous, both to the individual states which join in this brief as amici and to the nation at large. Approximately two thirds of the commercially important fish and shellfish harvested along the Atlantic coastline and in the Gulf of Mexico depend on coastal estuaries and their wetlands for food, spawning grounds, or nurseries for their young; on the Pacific coast, the figure is almost 50 percent. CEQ, Our Nation's Wetlands at 2;

Wetlands of the U.S. at 13. Sixty-three percent of total U.S. commercial landings of fish and shellfish in 1980 consisted of wetland-dependent estuarine species, representing 51.5 percent of the dollar value of the total catch (which amounts to some $1.15 billion). OTA, Wetlands at 58-59.

Waterfowl shooting and other kinds of hunting are major activities in wetlands. In 1980, 5.3 million people spent $638 million on hunting waterfowl and other migratory birds. Wetlands of the U.S. at 24. Sport fishermen spent over $13 billion in 1975 alone pursuing wetland-dependent fishes. *Id.* The aesthetic value of wetlands defies quantification, but it is noteworthy that in 1980 alone, 28.8 million people (17 percent of the U.S. population) participated in nonconsumptive wetlands activities such as birdwatching and photographing or feeding wildlife. Wetlands of the U.S. at 24.

Wetlands perform important water purification functions by removing nutrients, processing chemical and organic wastes, and reducing sediment loads in water. CEQ, Our Nation's Wetlands at 22-25; Wetlands of the U.S. at 18. Certain aquatic plants are so efficient at removing pollutants from water that they are used to process domestic sewage in some parts of the country. *Id.* In their natural state, wetlands also provide flood and erosion control benefits, protecting shorelines from erosion and reducing flood damage to downstream property owners. *Id.* at 21-23; CEQ, Our Nation's Wetlands at 27; OTA, Wetlands at 43-47. It has been estimated that wetlands provide $140 billion worth of flood and pollution control benefits to society. 123 Cong. Rec. 38,994 (1977) (remarks of Rep. Lehman). Wetlands also retain rainwater, which supplements surface streams or percolates into underground aquifers, thereby increasing water supplies. CEQ, Our Nation's Wetlands at 27.

Unfortunately, our understanding of the dynamic ecological functions performed by wetlands and our appreciation for the many benefits (economic as well as biological) they provide have come too late to save the vast bulk of our national wetland heritage. The original wetland acreage of this country, prior to European settlement, totalled approximately 215 million acres in the coterminous United States. Today, our wetland resources

amount to under 99 million acres, or less than 46 percent of our original wetlands. Wetlands of the U.S. at 28-29.[1] The conversion of wetlands to agricultural, residential, and other uses continues at an astonishing pace. Between the mid-1950's and the 1970's, the wetland conversion rate averaged between 450,000 and 550,000 acres per year. Wetlands of the U.S. at 31; OTA, Wetlands at 6, 87. Due to declining rates of agricultural drainage and government programs to regulate wetland use, this rate of loss has been curtailed somewhat to about 300,000 acres yearly at present. *Id.* at 11, 87.

Thus, wetlands are a diminishing natural resource of inestimable value to amici and the nation as a whole, in economic as well as biological terms. Amici believe it is imperative that our remaining wetlands be protected from wanton destruction. Rather than adopting their own wetlands protection programs, however, most states traditionally have looked to the federal government for wetlands regulation, particularly away from the coastal zone. Although almost all coastal states have regulatory programs designed to protect coastal wetlands, few have laws protecting

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[1] While these figures for the national decline in wetlands are dramatic, losses in particular regions and states have been even more startling. For example, California has lost over 90 percent of its original wetland resources. Wetlands of the U.S. at 32. In San Francisco Bay, 75 percent of the 313 square miles of historic wetlands have disappeared, while 95 percent of the Bay's tidal marshes have been diked or filled. Fish and Wildlife Service, U.S. Dep't of the Interior & Corps of Engineers, U.S. Dep't of the Army, The Ecology of San Francisco Bay Tidal Marshes: A Community Profile 14 (1983). Less than 5 percent of Iowa's natural wetlands remain. Wetlands of the U.S. at 32. Michigan, in which the instant case arose, has suffered the destruction of 71 percent of its original wetland resources. *Id.* at 34. In 1850, Florida possessed over 20 million acres of wetlands; today, that figure has dwindled to about 12 million acres. Gramling, *Wetland Regulation and Wildlife Habitat Protection: Proposals for Florida*, 8 Harv. Envt'l L. Rev. 365, 366 (1984).

inland wetlands, and noncoastal states generally do not have specific wetland programs at all. OTA, Wetlands at 13.[2]

California is representative of those states which rely almost completely on the Corps' regulatory jurisdiction under Section 404 to protect inland wetlands. As a coastal state, California has enacted laws protecting coastal wetlands from unrestricted development and conversion along its entire 1,000-mile coastline and in San Francisco Bay. The California Coastal Commission is the principal state agency responsible for conserving and regulating the use of the natural resources of the coastal zone, including wetlands, pursuant to the California Coastal Act of 1976. Cal. Pub. Res. Code §§ 30000-30900. Upland from the coastal zone, however, the Commission has no direct regulatory authority.

Within the confines of San Francisco Bay, the San Francisco Bay Conservation and Development Commission ("BCDC") is responsible for protecting coastal waters from undesirable filling. *See* Cal. Gov't Code §§ 66600-66661. BCDC has permit jurisdiction over projects in the Bay, certain other water bodies, managed wetlands, and a thin shoreline band around the Bay. *Id.* § 66610. Outside of these boundaries, BCDC has no regulatory control. These jurisdictional limits thus exclude vast expanses of wetland acreage, including diked historic baylands, which were once part of the greater San Francisco Bay system but were isolated from tidal action by diking or filling. The only effective regulatory protection for such wetlands is that provided by Section 404.[3]

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[2] Section 404, moreover, is the only federal statute which directly regulates dredging and filling of "adjacent wetlands" (generally, those which extend landward beyond the mean high or ordinary high water mark) such as the property involved in this case. *See* Want, *Federal Wetlands Law: The Cases and the Problems*, 8 Harv. Envt'l L. Rev. 1, 7-8 (1984).

[3] The other California agencies which have joined in this brief also have special responsibilities for wetland protection under state law. The Attorney General is the chief law enforcement officer of the state with authority to protect natural resources from pollution, impairment, or destruction. Cal. Gov't Code §§ 12600-12612. The California Coastal Conservancy makes grants to local public entities and nonprofit organizations to acquire, restore, and enhance valuable wetlands. Cal. Pub. Res. Code §§ 31000-31406.

California's regulatory scheme is by no means unique. As indicated above, while coastal wetlands are regulated reasonably well, through a combination of state programs and the Corps' 404 program, in most cases the only protection for inland wetlands is that provided by the Corps. OTA, Wetlands at 13. Consequently, the issues in this case are of major concern to the states joining in this brief.

SUMMARY OF ARGUMENT

Section 404 of the Clean Water Act of 1977 ("CWA"), 33 U.S.C. § 1344, prohibits the discharge of dredged or fill material into waters of the United States, including wetlands, without a permit from the Corps. The United States brought this action to enjoin the unpermitted discharge of fill material into a wetland site owned by the respondent, Riverside Bayview Homes, Inc. ("Riverside"). The district court found a portion of Riverside's property to be a wetland subject to the Corps' regulatory jurisdiction and enjoined further filling of that part of the site without a 404 permit.

Riverside appealed and the circuit court remanded the case to the district court for reconsideration in light of the Corps' revised 1977 definition of wetlands. A second district court judge also ruled for the United States, and Riverside appealed once again. The Court of Appeals, in the decision now under review by this Court, held that Riverside's property was not a wetland under the 1977 regulations and thus not subject to the Corps' 404 permit authority. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391 (6th Cir. 1984).

The circuit court ruled that the Corps' 404 jurisdiction to regulate the discharge of pollutants into wetlands is restricted to areas which support aquatic vegetation only by virtue of "frequent flooding by waters flowing from 'navigable waters' as defined in the Act." *Id.* at 398. Its rationale for engrafting this "frequent flooding" requirement onto the Corps' regulatory definition of

wetlands was based on both statutory and constitutional constraints. The court questioned whether Congress intended to reach properties having the characteristics attributed to Riverside's land, *id.* at 397-398, 401, and concluded that in any event the Corps' definition must be narrowly construed to avoid what it perceived to be "a serious taking problem under the fifth amendment." *Id.* at 397-398.

Amici contend that the Sixth Circuit's decision is plainly contrary to the intent of Congress in enacting Section 404. Unlike the circuit court, moreover, amici see no constitutional impediments to extending the Corps' regulatory jurisdiction over wetlands to the property owned by Riverside.

Congress declared that the objective of the CWA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this ambitious goal, Congress intended to assert jurisdiction over the nation's waters to the full extent of its powers under the Commerce Clause of the Constitution. This Court has repeatedly held, in an unbroken line of precedent, that the Commerce Clause is a grant of plenary authority which enables Congress to regulate purely intrastate activities as long as it has a rational basis for determining that such activities affect interstate commerce. The legislative history of the CWA, which the Court of Appeals completely ignored, unmistakably demonstrates that Congress not only had a rational basis for determining that the discharge of dredged or fill material into wetlands has major impacts on interstate commerce, but fully intended to reach such activities under Section 404. Congress recognized that wetlands perform essential environmental functions which are inextricably connected to the CWA's central object of purifying the nation's waters. These vital ecological services, in turn, have a social and economic dimension of which our legislators were well aware when they created the 404 program.

The Sixth Circuit's constricted reading of the Corps' regulation certainly was not required by any Fifth Amendment "taking" considerations. Riverside contests the jurisdiction of the Corps over its land and asserts its right to develop the parcel without having to obtain a 404 permit. Thus, the only "taking" issue

which can possibly arise is whether the regulation on its face effects a taking of Riverside's property without compensation. Neither Section 404 nor the implementing regulations necessarily forbid all beneficial use of the tract of land involved here; therefore, because Riverside has not been denied all economically viable use of the parcel, its property has not been taken in contravention of the Fifth Amendment.

Congress vested in the Corps broad jurisdiction to regulate the discharge of dredged and fill materials into adjacent wetlands, unconfined by arbitrary limitations of the sort imposed by the Court of Appeals. The Corps, exercising this congressional grant of authority, adopted a definition of "wetlands" which admirably serves the purposes Congress had in mind when it passed the CWA. By focusing on soil condition, the prevalence of aquatic vegetation, and the presence of abundant moisture (by virtue of either inundation or saturation)—the factors which scientists themselves typically take into account—the Corps' definition takes a biologically sound approach to the problem of identifying wetlands. Furthermore, insofar as the regulation's scope is directed at wetlands in close geographical proximity to streams, lakes, or seas, it properly recognizes the functional link between adjacent wetlands and such waterways.

By narrowly interpreting the Corps' regulation and imparting to it a limitation which neither Congress nor the Corps intended, the circuit court improperly fashioned its own judicial definition of wetlands. In so doing, the court disregarded the well-established rule that the views of an agency charged with administering a complex regulatory statute such as the CWA are entitled to judicial deference. Rather than deferring to the Corps' unquestioned expertise, the Court of Appeals improperly created its own definition, which bears little resemblance to the one adopted by the agency. In sharp contrast to the Corps' scientifically based approach, moreover, the Sixth Circuit's definition has no legitimate scientific basis and would artificially exclude broad categories of wetlands from protection with no rational basis for doing so. The circuit court's definition, in short, is neither good science nor good law.

ARGUMENT

I

IN THE EXERCISE OF ITS COMMERCE CLAUSE AUTHORITY, CONGRESS CONFERRED ON THE CORPS BROAD JURISDICTION TO REGULATE THE DISCHARGE OF DREDGED AND FILL MATERIAL INTO "ADJACENT WETLANDS" AS PART OF ITS PROGRAM TO EFFECTIVELY CONTROL POLLUTION OF THE NATION'S WATERS

The Court of Appeals held that the Corps' Section 404 jurisdiction to regulate the discharge of pollutants into "adjacent wetlands"[4] is restricted to areas which are "frequently flooded" by waters flowing from "navigable waters." *Unites States* v. *Riverside*, 729 F.2d at 397-398. Review of the 1972 and 1977 amendments to the CWA and the legislative record surrounding their enactment, however, plainly demonstrates that Congress intended no such limitation. As numerous other circuit courts have recognized,[5] Congress intended to extend the coverage of the Act as far

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[4] The Corps' regulations define "wetlands" as follows:

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 323.2(c) (1984). The Corps defines "adjacent" thusly:

> The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

33 C.F.R. § 323.2(d) (1984).

[5] *See, e.g., State of Utah v. Marsh*, 740 F.2d 799, 802 (10th Cir. 1984); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914-916 & n. 33 (5th Cir. 1983); *United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754-755 (9th Cir. 1978); *Minnesota v. Hoffman*, 543 F.2d 1198, 1200 n. 1 (8th Cir. 1976), *appeal dismissed*, 430 U.S. 977 (1977).

as permissible under the Commerce Clause of the Constitution. To effectively control pollution of the nation's waters, it adopted a strategy of regulating the discharge of pollutants at the point source. *See EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204-205 (1976). In so doing, Congress accorded the Corps broad jurisdiction under Section 404 to regulate the discharge of dredged and fill materials into "adjacent wetlands," unconfined by arbitrary limitations of the sort fashioned by the Court of Appeals.

A. The Corps' Regulation of the Discharge of Dredged and Fill Material in "Adjacent Wetlands" Is Well Within the Scope of Congress' Authority Under the Commerce Clause, and Congress Clearly Intended to Regulate Such Discharges

1. Congress Has Broad Authority Under the Commerce Clause to Regulate Water Pollution Activities

Since Congress premised the enlarged scope of federal authority to fully regulate water pollution activities on its authority under the Commerce Clause, we begin with a review of the applicable precedent in this area. This Court has agreed that the power conferred by the Commerce Clause is indeed "broad enough to permit Congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. 264, 282 (1981). The constitutional provision is a grant of plenary authority to Congress, and this power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 276, *quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 196 (1824).

In a number of cases the Court has made clear that "the power of Congress to promote interstate commerce also includes the power to regulate the incidents thereof, including local activities in both States of origin and destination, which might have a substantial and harmful effect upon that commerce." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1974); *see Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. at 310-313 (Rehnquist, J., concurring); *Wickard v. Filburn*, 317 U.S.

111, 124-125 (1942). Even if a particular activity has no perceptible interstate effect, it can be reached by Congress through regulation of that class of activity in general as long as the class, considered as a whole, affects interstate commerce. *See Hodel v. Indiana*, 452 U.S. 314, 324 (1981); *Perez v. United States*, 402 U.S. 146, 154 (1971); *Maryland v. Wirtz*, 392 U.S. 183, 192-193 (1968). As explained in *Perez:* "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez v. United States*, 402 U.S. at 154, *quoting Maryland v. Wirtz*, 392 U.S. at 193 (emphasis in original). In order to regulate an activity, Congress need only have a rational basis for a determination that the activity affects interstate commerce. *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. at 276.

2. The Legislative History of the CWA Demonstrates the Intent of Congress to Exercise Its Fullest Authority Under the Commerce Clause

Bearing in mind these rules, amici believe the Sixth Circuit fundamentally erred in failing to address in any sense the broad reach of jurisdiction under Section 404 intended by Congress in the exercise of its Commerce Clause authority, and the extensive legislative history of the CWA which makes that intent so abundantly clear. *See Train v. Colorado Pub. Int. Research Group*, 426 U.S. 1, 9-10 (1976). The legislative record plainly demonstrates that Congress, in defining "navigable waters" in the Act to mean "waters of the United States," 33 U.S.C. § 1362(7), fully intended to extend the reach of federal regulatory authority over water pollution activities to a class of activities it deemed to have potentially substantial effects on interstate commerce: the discharge of dredged and fill material into adjacent wetlands.

In furtherance of its principal objective under the Act to restore and maintain the integrity of the nation's waters, Congress expressly stated its intent at the outset "that the term 'navigable waters' be given the broadest possible constitutional interpretation. . . ." 1 Leg. Hist. at 327 (S. Rep. No. 1236, 92d Cong., 2d Sess. 14 (1972) (conference report)); *see also* 1 Leg. Hist. at 178 (remarks of Sen. Muskie); 1 Leg. Hist. at 250-251 (remarks of

Rep. Dingell).[6] The Senate report on the 1972 amendments explained the necessity for a broad definition of "navigable waters," unlimited by traditional concepts of navigability,[7] in order to control discharges at their source:

> "The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. *Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source.* Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries."

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[6] Citations to the Legislative History, unless otherwise indicated, are to Senate Committee on Environment and Public Works, A Legislative History of the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1973 & 1978), in four volumes.

[7] As used in the traditional sense, "navigable waters" has generally been interpreted for purposes of federal regulatory jurisdiction to include all waters used to transport interstate or foreign commerce, *The Daniel Ball*, 77 U.S. (10 Wall) 557 (1870); used in the past to transport interstate or foreign commerce, *Economy Light and Power Co. v. United States*, 256 U.S. 113 (1921); and susceptible to use in their ordinary condition or by reasonable improvement to transport interstate or foreign commerce, *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940). In the 1972 amendments, Congress opted for the broader definition of "navigable waters" contained in the CWA because it was plainly evident that a polluter could adversely affect navigable waters merely by dumping its waste, or dredged or fill materials, into a nonnavigable tributary of navigable waters or into adjacent wetlands. *See United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974).

2 Leg. Hist. at 1495 (emphasis added).[8]

In passing the 1977 amendments to the Act, Congress left no doubt about its intent to regulate the discharge of pollutants into wetlands. Efforts by the House to restrict the CWA's reach to waters that are in fact navigable were rejected in 1977. *See* 3 Leg. Hist. at 281-282. Significantly, the Senate also defeated an amendment proposed by Senator Bentsen which would have limited Section 404 jurisdiction to waters navigable-in-fact and their contiguous or adjacent saline or fresh water wetlands. 4 Leg. Hist. at 901-950. Indeed, the legislative record makes it very clear that when Congress rejected attempts to restrict the Corps' jurisdiction in 1977, it was fully aware of the Corps' regulatory extension of that jurisdiction beyond the traditional definition of "navigable waters" and of the Corps' pending revision of its wetland definition in the disputed regulation before this Court. 4 Leg. Hist. at 920-922 (remarks of Sen. Baker); 3 Leg. Hist. at 347-348 (remarks of Rep. Roberts).

Congress repeatedly emphasized the importance of protecting wetlands as part of its overall strategy for restoring the biological and chemical integrity of the nation's waters. Senator Muskie, one of the primary sponsors of the CWA, explained:

> "There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

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[8] With this strategy in mind, the lower federal courts had little difficulty concluding that "adjacent wetlands" were intended by Congress to be "waters of the United States" within the scope of the 1972 amendments to the Act. *See Conservation Council of North Carolina v. Costanzo*, 398 F. Supp. 653, 673-674 (E.D.N.C. 1975); *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370, 1381 (D.D.C. 1975); *United States v. Holland*, 373 F. Supp. 665, 674-676 (M.D. Fla. 1974).

> "The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve."

4 Leg. Hist. at 869.

Further, the substantial impacts upon the economy and interstate commerce derived from dredging and filling activities in wetlands were forcefully brought home in the remarks of Senators Chaffee and Baker. Senator Chaffee, in opposing the Bentsen amendment, addressed wetlands as a national asset, "not just confined within boundaries which happen to exist for any one of our States":

> "The wetlands perform a vital part of the food chain for our wildlife.
>
> "Mr. President, I call the attention of the Members of the Senate to the fact that 90 percent of the fish and shellfish in the whole Gulf of Mexico, that mammoth body of water, 90 percent of those fish and shellfish spend some part of their life cycle in Louisiana wetlands. More than two-thirds of the cash value of fish harvested along the Atlantic coast is derived from species that depend upon the estuaries.
>
> "In other words, it is a life chain that starts with the tiny little organisms that grow in these marshlands, are generated there, and then go to provide food up through the animal chain.
>
> "As we all know, the New England commercial fishery is vital to our economy. It is one of our more productive industries. For instance, in the State of Maine, in 1975, the last year for which we have figures, nearly $50 million was the value of the fishing harvest there. Ninety-eight percent of that was made up of species that depended upon the wetlands for some part of their life cycle."

4 Leg. Hist. at 917.

Senator Baker, during that same debate, observed that without wetlands "the cost of abating pollution in this country by industry and municipalities would be enormously increased by the additional costs that would be required by the technology to take the

place of what nature has provided us." 4 Leg. Hist. at 920. He emphasized that:

> "... [U]nlike most industrial and municipal pollution, dredged and fill material can physically destroy essential parts of the aquatic system, including swamps, marshes, submerged grass flats and shellfish beds. These critical aquatic areas are essential to many water uses, not the least of which is a viable commercial and sports fishery.
>
> "Wetlands serve as spawning and nursery areas while providing natural control of organic and inorganic nutrient transfer that dictate quantity and quality of life in the water. The declining availability of swamps, marshes, and free-flowing streams to assimilate pollution from point and nonpoint sources will greatly increase the dollar and energy costs of maintaining desirable water uses."

Id. at 921.

Other legislators voiced similar sentiments concerning the economic significance of wetlands. *See, e.g.*, 4 Leg. Hist. at 927 (remarks of Sen. Hart), 1247 (House Comm. Rpt., Additional Views of Reps. Edgar and Myers), 1317 (remarks of Rep. Lehman), and 1320 (remarks of Rep. Bonior).[9]

Finally, consistent with these views, Congress made its intent to reach pollution activities in adjacent wetlands explicit by specifically referring to "wetlands adjacent" to navigable waterways in one of the key provisions added to Section 404 by the 1977 amendments to the Act. *See* 33 U.S.C. § 1344(g)(1) (addressing state administration of the Section 404 program).

The foregoing therefore amply documents that, recognizing wetlands as a diminishing resource of inestimable value to the nation (in economic as well as biological terms), Congress believed it imperative to protect this resource through the 404 permit program. As for adjacent wetlands specifically, Congress

[9] The concerns of these legislators, moreover, are well grounded in the facts and statistics detailed in the introductory statement of the Interests of Amici, *supra*, demonstrating the national economic and commercial significance of wetlands.

purposefully determined to regulate, as a class under Section 404, the discharge of dredged and fill materials into such areas, which it regarded as an essential provision to protect the economy and interstate commerce from the substantial effects that may result from that kind of activity.[10] Amici submit the regulation of that class of activities unquestionably represents a valid and rational exercise of Congress' authority under the Commerce Clause.

3. The Corps' Definition Implements the Intent of Congress in the CWA

The Corps, in turn, had the intent of Congress, as well as this Court's Commerce Clause precedent, well in mind when it promulgated its final regulation defining "waters of the United States" for purposes of Section 404. 42 Fed. Reg. 37,127 (1977). Rejecting the traditional limits of the "navigable waters" in the case of wetlands, the agency explained in the preamble to the 1977 revision of its regulations:

> "The regulation of activities that cause water pollution cannot rely on these artificial lines, however, but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tideline,

[10] A number of courts have recognized that discharge of pollutants into the nation's waters, including adjacent wetlands, has the potential for exerting substantial effects on interstate commerce, even where the activity at issue is purely local in nature. These courts have pointed out, for example, that such activities may disrupt the food chain, essential to propagation of fish, shellfish, and other wildlife which could be taken and sold in interstate or foreign commerce, *Utah v. Marsh*, 740 F.2d at 803; *United States v. St. Bernard Parish*, 589 F. Supp. 617, 620 (E.D. La. 1984); impair the attraction of lakes and streams used by interstate travellers for swimming, boating, fishing, hunting, or viewing and appreciating bird and animal life, *Utah v. Marsh*, 740 F.2d at 804; *United States v. Byrd*, 609 F.2d at 1210; or degrade the quality of irrigation waters used for agricultural crops sold in interstate commerce. *Utah v. Marsh*, 740 F.2d at 804; *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979).

will affect the water quality of the other waters within that aquatic system.

"For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."

42 Fed. Reg. 37,128 (1977). It thus broadly defined "adjacent wetlands" as "waters of the United States", without the kind of constraint imposed by the Court of Appeals, to ensure that discharge activities in such sensitive areas would in fact receive regulatory scrutiny. That definition, born of the "organic" concept chosen by Congress to further its objective of eliminating the discharge of pollutants into the nation's waters, is wholly in accord with the goals Congress sought to accomplish under the CWA. *Cf. Hodel v. Virginia Surface Min. & Recl. Ass'n,* 452 U.S. at 283 (Surface Mining Act).

The approach of the Court of Appeals stands in stark contrast to the congressional intent underlying Section 404. The court's restriction of the Corps' jurisdiction to wetlands "frequently flooded by waters flowing from the 'navigable waters' " literally makes no sense, when viewed either against the breadth of regulation intended by Congress to combat water pollution or the substantial effects on interstate commerce exerted by the discharge of pollutants in such areas. This perhaps is not surprising given that the court in its opinion simply failed to address either of these factors. Recognizing that "[w]ater moves in hydrological cycles," 2 Leg. Hist. at 1495, Congress also quite clearly sought to regulate, as a particular class of activities, the discharge of pollutants in wetlands which drain by ground or surface water runoff into other adjacent waters. The Corps' wetland definition reaches activities of this sort and therefore achieves precisely the broad extent of jurisdiction intended by Congress to effectively control water pollution by regulating it at its source.

In short, the Court of Appeals seriously erred in its attempt to restrict the scope of the Corps' wetland jurisdiction. Since, in the instant case, the discharge of fill on Riverside's property falls well

within the broad class of activities Congress appropriately sought to regulate under the CWA, it is properly reached under Section 404.

B. The Sixth Circuit's Narrow Interpretation of the Corps' Regulation Is Not Compelled by the Takings Clause of the Fifth Amendment

In attempting to justify its narrow construction of the Corps' regulatory authority over wetlands, the Court of Appeals reasoned that its interpretation was compelled by the Takings Clause of the Fifth Amendment to the Constitution. 729 F.2d at 397-398. The Court explained that it took this approach "in order to avoid serious questions concerning the [constitutional] validity of the definition itself" under the CWA. *Id.* at 397. Far from being required by the Fifth Amendment, however, the Sixth Circuit's constricted reading of the regulation reveals an erroneous understanding of this Court's decisions in the takings area.[11]

As the Court has made clear in a series of land use cases, the "taking" question is fundamentally a factual inquiry. *Hodel v.*

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[11] The circuit court expressed the opinion that a restrictive interpretation of the wetlands definition was needed lest the Corps' jurisdictional reach extend to "low lying backyards miles from a navigable waterway". 729 F.2d at 401. We submit, however, that the Corps' definition contains "an adequate limiting principle", *id.*, that makes the court's narrow reading of the regulation wholly unnecessary. First, isolated wetlands not in close proximity to waterways that are in fact navigable are subject to the Corps' 404 jurisdiction only if there is a provable nexus between them and interstate or foreign commerce. *See* 33 C.F.R. § 323.2(a)(3)(1984). Secondly, in the preamble to its 1977 revision of the regulations, the Corps explained that the term "normally" was inserted into the wetlands definition, in part, to exclude from 404 jurisdiction areas that exhibit an abnormal presence of aquatic vegetation but are not true wetlands. As the Corps interpreted the new definition, "the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program." 42 Fed. Reg. 37,128 (1977). Thus, the Corps itself has interpreted its own regulation in a manner which remains faithful to Congress' intent in the CWA and falls well within constitutional boundaries, making judicial revision quite unnecessary.

Virginia Surface Min. & Recl. Ass'n, 452 U.S. at 294-295; *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 123-124 (1978). In developing the jurisprudence of the Fifth Amendment's Taking Clause, the Court has not developed any "set formula" for determining when public actions resulting in economic injury must be compensated by the government. Instead, it has often observed that whether a particular restriction will be held invalid for the government's failure to compensate the property owner for losses caused by regulatory conduct "depends largely 'upon the particular circumstances [in that] case.'" *Penn Central v. New York City,* 438 U.S. at 124, *quoting United States v. Central Eureka Min. Co.,* 357 U.S. 155, 168 (1958). Several factors have been identified as being of particular significance: the economic impact of the regulation in question, the character of the governmental action, and the extent of its interference with "reasonable investment-backed expectations." *Kaiser Aetna v. United States,* 444 U.S. at 175.

None of these "essentially ad hoc, factual inquiries", *id.,* can be addressed in the abstract. They can only be conducted with respect to specific property and with careful attention to the particulars of the economic harm suffered by the property owner in his unique circumstances. *Hodel v. Virginia Surface Min. & Recl. Ass'n,* 452 U.S. at 295. Given the procedural posture in which the instant case arose, the question of whether the 404 permit requirement resulted in a "taking" of Riverside's property cannot be answered. The issue presented here is not whether the Corps' denial of a 404 permit was reasonable under all the circumstances, but whether Riverside must apply for a permit in the first place.[12]

[12] While this case was on appeal in the Sixth Circuit, the Corps denied Riverside's application for an after-the-fact permit for a 10-acre area it had already filled without authorization by the Corps, and also refused permission to fill an additional 30.6 acres. This permit denial was based on the adverse impact of the fill on the wetland, and the absence of a permit from the State of Michigan. U.S. Pet. 11 n. 8; *see* 33 C.F.R. § 325.8(b) (1984). Riverside never sought judicial review of this decision, and the Court of Appeals had no occasion to consider whether the Corps' permit denial was reasonable or effected a taking under the circumstances. Therefore, this question is not presented to the Court here, and in any event Riverside, by its failure to appeal the Corps' administrative determination, has waived any claim that the refusal of a permit effected a taking of its property.

Since Riverside has resisted this requirement on the grounds the Corps has no jurisdiction over its land, the Sixth Circuit's conclusion that its restrictive interpretation of the regulation was dictated by Takings Clause considerations could only have been founded on an implicit judgment that Section 404 or the regulations on their face effect a taking of Riverside's property. The test applied to such a facial challenge is that a statute or regulation limiting the use of property results in a taking if it "denies an owner economically viable use of his land . . ." *Hodel v. Virginia Surface Min. & Recl. Ass'n,* 452 U.S. at 295-296, *quoting Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). Section 404 and the Corps' regulations easily survive this test.

The Court of Appeals apparently was laboring under the misapprehension that sanctioning the Corps' assertion of 404 jurisdiction over Riverside's property would be tantamount to approving an absolute prohibition of "any development or change of such property by the landowner". 729 F.2d at 398. Requiring that Riverside obtain a permit from the Corps, however, is not equivalent to forbidding all development. Indeed, the Act itself clearly presupposes that permits will be issued in appropriate circumstances. *See* 33 U.S.C. § 1344(a) & (b). To assume that requiring a 404 permit would necessarily frustrate the developer's plans, as the lower court apparently did, is to ignore the plain language of the Act.

Moreover, even if one were to assume that Riverside would be unable to obtain a permit for its project, it does not necessarily follow that the corporation would be deprived of any economically viable use of its property. The Act exempts certain categories of discharge entirely, 33 U.S.C. §1344(f)(1), and the regulations provide for permits to be granted for numerous activities and uses. *See generally* 33 C.F.R. part 330 (1984); 40 C.F.R. part 230 (1984). Thus, since the Act and the regulations, on their face, do not forbid all uses of the property, a taking claim based only on a

recognition of Corps jurisdiction is premature and cannot be sustained. *Cf. Hodel v. Virginia Surface Min. & Recl. Ass'n,* 452 U.S. at 296-297 (Surface Mining Act does not, on its face, prevent beneficial use of coal bearing lands); *see Avoyelles Sportsmen's League v. Marsh,* 715 F.2d at 927; *United States v. Byrd,* 609 F.2d at 1211; *United States v. Ciampitti,* 583 F. Supp. 483, 495-496 (D.N.J. 1984).[13]

The only authority relied upon by the Sixth Circuit in analyzing the "taking" issue was *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Not only are the "parallels" between the case at bar and *Kaiser Aetna* not "obvious", as the lower court asserted, that decision does not even remotely suggest that a narrow view of the government's regulatory jurisdiction under the CWA is required to avoid a constitutional problem. The Court in *Kaiser Aetna* was concerned with the proper scope of the government's traditional navigational servitude, and the issue was whether that servitude negated any private property interest in navigable waters. In rejecting the argument that the navigational servitude necessarily immunizes the government from a Fifth Amendment taking claim, the Court remarked that applying the navigational servitude to create a public right of access would "result in an actual physical invasion of the privately owned marina" and held that the government's assertion of such a right of access "goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking". *Id.* at 178, 180.

In the instant case, by contrast, we are not presented with any physical invasion of Riverside's property by the government. Nor

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[13] Even if a taking were found here, Riverside would have no constitutional complaint unless appropriate relief were unavailable. *Hodel v. Virginia Surface Min. & Recl. Ass'n,* 452 U.S. at 297 n. 40. Presumably, if the denial of a 404 permit were held to be a taking, Riverside would have a remedy by way of either an action in the U.S. Court of Claims, 28 U.S.C. § 1491, or judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. § 702. *See Buttrey v. United States,* 690 F.2d 1170, 1183-84 (5th Cir. 1982), *cert. denied,* 103 S.Ct. 2087 (1983); *Deltona Corp. v. United States,* 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied,* 455 U.S. 1017 (1982). No showing to the contrary was made by Riverside or by the Court of Appeals.

does the Corps' mere assertion of regulatory jurisdiction "extinguish a fundamental attribute of ownership". *Agins v. Tiburon,* 447 U.S. at 262. In fact, the Court in *Kaiser Aetna* expressly acknowledged the government's rightful authority to regulate the navigable water involved there in order to protect navigation and promote commerce, without "taking" private property in contravention of the Fifth Amendment. *Kaiser Aetna* v. *United States,* 444 U.S. at 174, 179. This Court's holding in *Kaiser Aetna,* therefore, provides no support for the Sixth Circuit's taking analysis.

In short, the application of the CWA to Riverside's property creates no conflict with the Takings Clause. The "serious questions" about the constitutional validity of the Corps' definition of wetlands which concerned the Sixth Circuit, on close examination, present little difficulty, particularly in the procedural context in which this case comes before the Court. Fifth Amendment "taking" considerations thus do not compel the overly restrictive interpretation of the Corps' regulations which the Court of Appeals adopted.[14]

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[14] Riverside also maintained in the court below that subjecting its property to regulation under Section 404 would contravene the Congressional policy expressed in the CWA that the primary responsibility for land use decisions should continue to reside with state and local governments. *See* 33 U.S.C. § 1251(b). Riverside's fear that defining its property as a "wetland" for Section 404 purposes would inject an unwarranted federal presence into an area better left to the states is unfounded. In the first place, to equate wetlands protection with local land use controls is to confuse the well-defined and specific objectives of the former—water quality protection, flood prevention, groundwater recharge, fish and wildlife conservation—with the more general concerns of the latter. Unlike local zoning and other land use decisions, activities subject to 404 regulation often have effects far removed from the local jurisdiction. Blumm, *Wetlands Preservation, Fish and Wildlife Protection, and 404 Regulation: A Response,* 18 Land & Water L. Rev. 469, 472-473 (1983). More importantly, federal control over dredging and filling is largely a matter of choice for individual states, inasmuch as they have the option of administering part of the 404 permit program themselves within their jurisdictions. 33 U.S.C. § 1344(g).

II

THE COURT OF APPEALS ERRED IN NOT DEFERRING TO THE CORPS' TREATMENT OF "ADJACENT WETLANDS" AS "WATERS OF THE UNITED STATES" AND IN SUBSTITUTING ITS OWN WETLAND TEST FOR THAT OF THE AGENCY

As a consequence of its constricted interpretation of the Corps' wetland definition, the Court of Appeals, in effect, fashioned its own wetland test—a test which bears little resemblance in either form or substance to the one adopted by the agency. In so doing, it plainly erred in not deferring to the Corps' definition and in substituting its own judicially created version. The record in this case readily supports the district court's ruling that Riverside's discharge activities fell properly within the scope of the Corps' regulatory jurisdiction.

This Court has recently confirmed the long-standing rule that the views of an agency charged with administering a complex statute such as the CWA are entitled to judicial deference, and moreover that a court may not substitute its own construction of a statutory provision for a rational one made by the agency. *Chemical Mfrs. Ass'n v. NRDC*, 105 S.Ct. 1102, 1108 (1985); *Chevron USA, Inc. v. NRDC*, 104 S.Ct. 2778, 2782-2783 (1984); *Train v. NRDC*, 421 U.S. 60, 75, 87 (1975).

Under the CWA, Congress delegated substantial discretion to the Corps to implement the 404 permit program. The final wetland definition promulgated by the agency in 1977 was developed in response to numerous comments concerning its earlier interim definition, and after drawing upon its special expertise in wetlands regulation and the expertise provided by the Departments of Interior and Agriculture and the Environmental Protection Agency ("EPA"). 42 Fed. Reg. 37,128 (1977); *see also Avoyelles Sportsmen's League v. Marsh*, 715 F.2d at 911 n. 27. EPA has added the same definition to its 404 guidelines. 40 C.F.R. § 230.3(t) (1984). While adopted for jurisdictional purposes, the definition blends scientific and technical factors—vegetation, soil, and hydrology—into a convenient and workable methodology for identifying wetlands. Furthermore, it

bears repeating that during the debates over the 1977 amendments to the CWA, Congress was well aware of the broad reach of this wetland definition and fully embraced it. *See* 4 Leg. Hist. at 920-922 (remarks of Sen. Baker); 3 Leg. Hist. at 347-348 (remarks of Rep. Roberts).

Accordingly, the Court of Appeals should have given the Corps' definition the deference required under the well-established rules outlined above. In essentially rewriting the regulation instead, it clearly misconceived its role. Its interpretation would substitute for the Corps' scientifically based definition one that is patently artificial, unworkable, and unpredictable. As discussed below, the court departed from the Corps' definition in three significant respects, the result of which would be the exclusion of broad categories of adjacent wetlands from 404 regulation.

First, the Corps' definition addresses lands that are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support" aquatic vegetation. 33 C.F.R. § 323.2(c) (1984). In its discussion, however, the circuit court completely ignored saturation and focused exclusively on inundation as the essential source of water in classifying an area as a wetland. Moreover, it compounded this error throughout its opinion by misquoting the regulatory definition, conspicuously omitting the words "or saturated by surface or ground water." *See* 729 F.2d at 396-398.

From a scientific point of view, it is the presence of water in the soil or substrate of a particular duration and frequency—regardless of how it got there—which determines the ability of plants to grow in and dominate an area. As the U.S. Fish and Wildlife Service has explained:

> "Wetlands are lands where saturation with water is the dominant factor determining the nature of soil development and the types of land and animal communities living in the soil and on its surface. The single feature that most wetlands share is soils or substrate that is at least periodically saturated with or covered by water. The water creates severe physiological problems for all plants and animals except those that are adapted for life in water or in saturated soil."

Fish and Wildlife Service, U.S. Dep't of the Interior, Classification of Wetlands and Deepwater Habitats of the United States 3 (1979).

The disjunctive nature of the Corps' definition is thus particularly appropriate given the variability of hydrologic regimes controlling waters throughout the nation. Nowhere is this more evident than in California where, along its 1,000-mile coastline, wetlands exist on a continuum between wet and alternating wet and dry conditions. In the northern portions of the state, flooding (inundation) may be the primary source of waters giving rise to a wetland area. In the drier, southern half of the state, by contrast, wetlands are more likely to be sustained by virtue of ground water saturation or surface water runoff as a result of precipitation. *See* California Coastal Commission, Statewide Interpretative Guidelines for Wetlands and Other Wet Environmentally Sensitive Habitat Areas 33, 78 (1981). Under the Corps' definition, both would properly be reached by Section 404 regulations. The test created by the Court of Appeals, on the other hand, would simply cleave wetlands of the latter kind out of the agency's definition.[15]

The second major flaw in the Court's test is the requirement that flooding from the navigable waters must be "frequent". There is no such requirement in the Corps' wetland definition. Indeed, while noting that the Corps eliminated in its final regulation the element of "periodic" inundation contained in its previous definition, 729 F.2d at 395, the court in its holding appears to resurrect that very requirement.

The record in this case well underscores the difficulty the first district court judge had in addressing the question of whether Riverside's property was "periodically inundated." Pet. App. 25a-31a. The Corps was particularly aware of that difficulty and

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[15] The Corps' definition, because it covers both saturation and inundation, also furthers congressional recognition that protection of the wetlands of the United States requires "an 'organic' concept of the national aquatic system" and thus "a permit system with 'no gaps' in its protective measures." *United States v. Huebner*, 752 F.2d 1235, 1240 & n. 9 (7th Cir. 1985). The Sixth Circuit's test does not begin to address that congressional intent.

indeed of the district court's decision in preparing its final wetland regulation. 42 Fed. Reg. 37,124 & 37,128 (1977). To provide greater clarity for both landowners and regulators, the agency intentionally revised its definition to eliminate the requirement of showing inundation "over a record period of years".[16] The circuit court's test nonetheless would reintroduce such a requirement and the very uncertainty created under the Corps' earlier test. It gives no guidance whatsoever concerning how frequent is "frequent" or, for that matter, what hydrologic proof would be required merely to determine whether an application for a 404 permit must be made to the Corps for a particular discharge activity.

Lastly, the court's holding is completely off the mark in its requirement that to subject an "adjacent" wetland to 404 regulation, not only must it be "frequently flooded", but the flooding must flow *from* the navigable waters. This limitation arbitrarily excludes from 404 regulation wetlands feeding, rather than fed by, adjacent streams, lakes, or seas. It would therefore place outside the Corps' jurisdiction discharge activities having a clear and direct impact upon the quality of such waterways—a result Congress clearly did not intend.[17] Congress rejected such artificial

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[16] The Corps explained in the preamble to the 1977 revision of its regulations:

> "This definition is intended to eliminate several problems and achieve certain results. The reference to 'periodic inundation' has been eliminated. Many interpreted that term as requiring inundation over a record period of years. Our intent under Section 404 is to regulate discharges of dredged or fill materials into the aquatic system as it exists, and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation. . . ."

42 Fed. Reg. 37,128 (1977).

[17] Although the instant case involves wetlands "adjacent" to waterways that are navigable-in-fact, it should be recognized that the Sixth Circuit's holding would deprive the Corps of jurisdiction over isolated wetlands, as well. The latter serve crucial ecological functions in their own right. In Nebraska, for example, most wetlands are isolated from

limitations, recognizing that "[w]ater moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." 2 Leg. Hist. at 1495; *see also Avoyelles Sportsmen's League v. Marsh*, 715 F.2d at 915; *United States v. Ashland Oil*, 504 F.2d at 1329.

To summarize, therefore, in contrast to the test created by the circuit court, the Corps' wetland regulation provides a biologically sound, workable methodology for identifying wetlands. It is consistent with and facilitates the means Congress has chosen to control water pollution. The Court of Appeals should have deferred to that regulation.

Applying the regulation to the facts of this case, moreover, we see that the record amply demonstrates that the property at issue is a wetland. Riverside's property is located but 200 feet from Black Creek, a navigable tributary of Lake St. Clair. Pet. App. 23a-24a. In addition, it is approximately one mile from Lake St. Clair, a significant commercial waterway linking the Upper and Lower Great Lakes with a 27-foot seaway channel. JA 17; *see Hoopengarner v. United States*, 270 F.2d 465, 471 (6th Cir. 1959). The principal use of this lake and its shoreline is recreational, including boating, fishing, and seasonal waterfowl hunting. JA 17.

The record shows that Riverside's property is part of a larger wetland system that borders Lake St. Clair. JA 16-20, 58. Further, it is part of an undeveloped area that runs to Black Creek, which has exhibited wetland vegetation and saturated soils for decades. JA 51-53, 56, 58-59, 64-65, 67-68, 70-71. Significantly, the evidence below made clear that the unfilled portions of Riverside's parcel itself are characterized by the prevalence of wetland vegetation that both requires and is supported by saturated soil conditions. JA 26, 28-29, 33, 35, 39-42, 47-48, 55, 77. Finally, expert testimony described the environmental functions of this area as providing habitat for muskrats and birds and

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surface tributaries of traditionally navigable waters, but they are nonetheless of vital importance to migrating sandhill cranes and waterfowl in the Central Flyway. *See* Wetlands of the U.S. at 46-48.

furnishing food resources for fish in nearby Lake St. Clair. JA 39-42, 55, 62-63, 72, 75-76.

This evidence fully supports the conclusion reached by the district court that large portions of Riverside's property constitute "adjacent wetlands" and thus "waters of the United States", as defined by the Corps in its regulations implementing the 404 permit program. Amici therefore submit that the trial court was correct in its determination that Riverside's discharge activities are subject to the Corps' 404 permit jurisdiction.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision of the Court of Appeals should be reversed.

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